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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-515

FRED J. ZEEHANDELAAR,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Fred J. Zeehandelaar prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered against him on September 8, 1975, which affirmed an Order of the United States District Court for the Southern District of New York. The Order of the District Court had imposed a new sentence upon petitioner with respect to a judgment of conviction, a portion of the prior sentence having previously been declared illegal by the Court of Appeals.

Petitioner further prays that the instant petition be considered in conjunction with his already pending petition, *Zeehandelaar* v. *United States*, Docket No. 75-277.

Opinions Below

The Court of Appeals affirmed the judgment of conviction without opinion on May 7, 1975, *United States* v. *Zeehandelaar*, 516 F.2d 897 (2d Cir., 1975). The order of affirmance, however, remanded the case to the District Court for correction of an improper sentence Appeals affirmed the legality of the new sentence in rehearing en banc (4a) were both denied on July 23, 1975, without opinion.

Pursuant to the order of the Court of Appeals, the case was remanded to the District Court for a resentencing of the petitioner. Following resentencing, the petitioner again appealed to the Court of Appeals on an expedited basis. On September 8, 1975, the Court of Appeals affirmed the legality of the new sentence in a brief memorandum-order (5a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on September 8, 1975 (5a).

Question Presented for Review

Where a District Court, as part of a criminal sentence, requires that the defendant, as a condition of probation, make a $5000 contribution to the United States Department of the Interior, and where the Court of Appeals subsequently declares such a forced contribu-

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* References to the Appendix to this Petition are as follows: "-a". References preceded by "A." are to the Appellant's Appendix filed in the Court of Appeals under that Court's Docket No. 75-1026.

tion to be illegal, may the District Court subsequently substitute an equivalent criminal fine in place of the forced contribution? Does such an increase in the sentence constitute a violation of the due process and double jeopardy clauses of the Fifth Amendment?

Constitutional Provision Involved

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case *

Following a jury trial, the petitioner was convicted of having made a false declaration during his testimony at a prior trial in violation of 18 U.S.C. § 1623. That statute provides that, in the event of a conviction, a defendant, "shall be fined not more than $10,000 or imprisoned not more than five years, or both."

In the present case, the District Court pronounced sentence as follows:

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* This statement of the case is limited to facts in relating to Petitioner's sentence. A detailed statement of facts is set forth in the companion petition, *Zeehandelaar* v. *United States*, 75-277.

> "Defendant is placed on unsupervised probation for a period of one year, upon *condition that he pay the sum of $5000 to the Department of the Interior, which shall be used in connection with the preservation of endangered species*, payment to be arranged by the probation department" [emphasis added] (A. 1294; *See also* Judgment at A. 1302).

The legality of the forced contribution was one of the issues raised upon the appeal to the Court of Appeals. The order of the Court of Appeals, which affirmed the judgment of conviction herein in other respects, also provided that:

> "[I]t was improper for the trial court to order appellant to pay a sum to the Department of Interior, 'which shall be used in connection with the preservation of endangered species. . . .'
>
> Such a forced contribution is an improper sentence. Accordingly, we affirm in all respects except as to the sentence imposed, and we remand to the lower court solely for resentencing; any fine imposed upon such resentencing may not exceed $5000, the amount of the contribution originally imposed." (Appendix A hereto).

The relief petitioner had requested from the District Court, with respect to the sentence, was that the illegal portion be "stricken from the judgment." (Appellant's Brief in the Court of Appeals, p. 44). Instead, as can be seen, the Court of Appeals authorized the District Court to impose a fine not exceeding $5,000. A Petition for Rehearing and a Petition for Rehearing *en banc*, both challenged that grant of authority to the District Court, upon the ground that the imposition of a fine would constitute an illegal increase in the valid portion of the original sentence. Those petitions were denied (3a, 4a).

Pursuant to the Remand Order of the Court of Appeals; the petitioner was resentenced in the District Court on August 6, 1975. The District Court did, in fact, impose a $5,000 fine in place of the $5,000 contribution.

An appeal was taken to the Court of Appeals, upon an expedited basis. However, the time was about to run for the filing of a Petition for a Writ of Certiorari with this Court with respect to the original judgment of the Court of Appeals. For that reason, a Petition for a Writ of Certiorari was timely filed, *Zeehandelaar* v. *United States*, Docket No. 75-277. That Petition, which is still pending, raises, *inter alia*, the question of whether the Court of Appeals properly authorized the District Court to impose a fine in place of the illegal forced contribution.

On September 8, 1975, the Court of Appeals affirmed the Order of the District Court which had imposed the fine upon the petitioner. The instant petition is filed for the purpose of seeking review of that affirmance.

Reasons for Granting the Writ

The concededly illegal portion of the sentence imposed upon the petitioner should have been stricken from the judgment and no additional punishment should have been imposed upon him. By substituting a fine in place of the illegal portion of the original sentence, the District Court impermissibly increased the valid portion of the original sentence in violation of the due process and double jeopardy clauses of the Fifth Amendment.

This is not a case where the District Court originally imposed a greater sentence than was authorized by law, and then merely modified the sentence by decreasing it to that which the law allows. Similarly, this is not a case where a defendant has been retried and the sentence has been increased due to some intervening revelation concerning his background, conduct or character.

In this case, the Court of Appeals authorized the District Court to impose a $5,000 fine in place of an illegal condition of probation, and the District Court, in fact, did so. It is respectfully submitted that the only remedy available for the correction of an illegal condition of probation is the deletion of that condition from the sentence. The conversion of the illegal provision into a $5,000 fine constituted an impermissible increase in the valid portion of the sentence, in violation of the double jeopardy and due process clauses of the Fifth Amendment. Such an increase is clearly violative of the principles enunciated in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); *Owensby* v. *United States*, 385 F.2d 58 (10th Cir., 1967); *Pugliese* v. *United States*, 353 F.2d 514 (1st Cir., 1965) and *Ekberg* v. *United States*, 167 F.2d 380, 380-388 (1st Cir., 1948).

In *Ekberg*, *supra*, a defendant was convicted upon three counts of an indictment. He was sentenced to a term of two years and one month on each of the three counts, with the sentences on the second and third counts to run concurrently, but consecutively to the sentence imposed on the first count. Additionally, the Court suspended the execution of the sentences on the second and third counts and placed the defendant on probation for a period of five years commencing upon the completion of the service of sentence on the first count. On appeal, the Court of Appeals held that the sentence under count one should never have been imposed. This ruling manifestly overturned the sentencing scheme anticipated by the sentencing judge. The question thus presented was whether the sentences imposed under the second and third counts could validly be modified in order to realize the original sentencing objective of the sentencing judge. The Court of Appeals, upon the following reasoning, held that this could not be done:

> "It is true that the judge could lawfully have originally sentenced appellant to a maximum of three

> years on each of Counts II and III, to run consecutively, because, as above pointed out, those two counts stated separate and distinct offenses. Hence, it might be suggested that the District Court, in the course of striking out the invalid sentence on Count I, should now be allowed to resentence appellant on Counts II and III. But it is quite plain that merely because the trial judge could have imposed consecutive sentences on Counts II and III equal to the aggregate sentences which he actually imposed on invalid Count I and valid Counts II and III, 'the matter may not be treated as though he had done so.' *Miller* v. *United States*, *supra*, 2d Cir., 1945, 147 F.2d 372, 374. It is too late to go back and start over again. The concurrent sentences on Counts II and III were valid as originally imposed. Disregarding the invalid sentence under Count I, and attributing the time served to the sentences under Counts II and III, as must be done, it will be seen that the appellant has fully paid the penalty, exacted by society through the sentence of a competent court, for the only offense of which he was properly convicted. It would trench upon the double jeopardy clause if appellant were now faced with the possibility of an increase of the sentences imposed upon Counts II and III. [Citations omitted]." 167 F.2d at 388.

In the present case, the Court of Appeals permitted the District Court ". . . to go back and start over again." We respectfully submit that, in doing so, the District Court violated the defendant's rights under the due process and double jeopardy clauses of the Fifth Amendment.

Respectfully submitted,

JAC M. WOLFF
HENRY J. BOITEL
Attorneys for Petitioner
Fred J. Zeehandelaar

September, 1975

APPENDIX A

(Order of the Court of Appeals Affirming Conviction)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1026

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of May, one thousand nine hundred and seventy-five.

Present:

J. EDWARD LUMBARD
PAUL R. HAYS
WILLIAM HUGHES MULLIGAN
Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

—against—

FRED J. ZEEHANDELAAR,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix A—Order of Affirmance

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed except as to the sentence imposed. None of the other arguments raised on appeal has merit; however, it was improper for the trial court to order appellant to pay a sum to the Department of Interior, "which shall be used in connection with the preservation of endangered species. . . ." Such a forced contribution is an improper sentence. Accordingly, we affirm in all respects except as to the sentence imposed, and we remand to the lower court solely for resentencing; any fine imposed upon such resentencing may not exceed $5,000, the amount of the contribution originally imposed.

/s/ J. EDWARD LUMBARD
J. EDWARD LUMBARD

/s/ PAUL R. HAYS
PAUL R. HAYS

/s/ WILLIAM HUGHES MULLIGAN,
WILLIAM HUGHES MULLIGAN, USCJs

APPENDIX B

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-1026

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of July, one thousand nine hundred and seventy-five.

Present:

HON. J. EDWARD LUMBARD,
HON. PAUL R. HAYS,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRED J. ZEEHANDELAAR,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

By: VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX C

Order of the Court of Appeals Denying Rehearing *en banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

75-1026

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of July, one thousand nine hundred and seventy-five.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

FRED J. ZEEHANDELAAR,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellant, Fred J. Zeehandelaar, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN,
IRVING R. KAUFMAN,
Chief Judge.

APPENDIX D

(Order of the Court of Appeals Affirming Resentence)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORDER
75-1314

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRED J. ZEEHANDELAAR,

Defendant-Appellant.

By order dated May 7, 1975, this Court remanded the above-entitled action to the District Court for resentencing. Upon remand, the District Court on August 6, 1975 imposed a new sentence of one year unsupervised probation and a $5,000.00 fine. Defendant promptly filed his notice of appeal and moved for expedited consideration of his case, which we granted.

The only question now before this Court is the propriety of the new sentence. We find no error and accordingly affirm the order of the District Court.

/s/ J. EDWARD LUMBARD
J. EDWARD LUMBARD

/s/ PAUL R. HAYS
PAUL R. HAYS

/s/ WILLIAM H. MULLIGAN, USCJs
WILLIAM H. MULLIGAN,

Dated: September 8, 1975.